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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 MOISES BAUTISTA,) No. CV 17-6004 RGK (FFM)
12 Petitioner,)
13 v.) ORDER TO SHOW CAUSE WHY THE
14 WARDEN RAYMOND) PETITION SHOULD NOT BE
15 MADDEN,) DISMISSED AS UNTIMELY
16 Respondent.)

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18 On August 8, 2017, petitioner Moises Bautista (“petitioner”), a California
19 prisoner, constructively¹ filed a Petition for Writ of Habeas Corpus by a Person
20 in State Custody (the “petition”) pursuant to 28 U.S.C. § 2254. (Dkt. 1.) The
21 petition challenges petitioner’s 2014 conviction in the Superior Court of Los
22 Angeles County for various crimes.

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27 ¹ A pro se petitioner’s relevant filings may be construed as filed on the date
28 they were submitted to prison authorities for mailing, under the prison “mailbox
rule” of *Houston v. Lack*, 487 U.S. 266 (1988). While no proof of service is
attached to the petition, the outside of the envelope in which the petition was
filed bears a notation seemingly indicating that the petition was received by
prison authorities on August 8, 2017.

1 **1. LIMITATIONS PERIOD FOR FEDERAL HABEAS PETITIONS**

2 The present proceedings were initiated after the April 24, 1996, effective
3 date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub. L.
4 No. 104–132, 110 Stat. 1214 (1996). Accordingly, AEDPA’s timeliness
5 provisions apply, including a one-year limitations period which is subject to both
6 statutory and equitable tolling. *See* 28 U.S.C. § 2244(d)(1). For those prisoners
7 whose convictions became final post-AEDPA, the one-year period starts running
8 from the latest of four alternative dates set forth in 28 U.S.C. § 2244(d)(1)(A)-
9 (D). *See, e.g., Patterson v. Stewart*, 251 F.3d 1243, 1245–47 (9th Cir. 2001).

10 Because petitioner has not provided any basis to find otherwise, the Court
11 presumes that Section 2244(d)(1)(A), which governs the start date in most
12 habeas cases, applies here. Section 2244(d)(1)(A) provides that the one-year
13 limitations period “shall run from the latest of . . . the date on which the
14 [petitioner’s conviction] became final by the conclusion of direct review or the
15 expiration of the time for seeking such review.” Where, as here, the challenged
16 judgment was affirmed by the state’s highest court, the period of direct review
17 ends either when the petitioner failed to file a *certiorari* petition in the United
18 States Supreme Court and the 90-day period for doing so has expired, or when
19 the Supreme Court has ruled on a filed petition. *See Clay v. United States*, 537
20 U.S. 522, 527-32 and nn.3-4, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003); *Wixom v.*
21 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

22 The California Supreme Court denied petitioner’s petition for review on
23 June 17, 2015.² Thus, for the purposes of section 2244(d)(1)(A), petitioner’s
24 conviction became final on September 15, 2015, ninety days after the California

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26 ² The Court takes judicial notice of Petitioner’s state court proceedings as
27 indicated on the California Courts of Appeal official case information website,
28 found at <http://appellatecases.courtinfo.ca.gov/index.html>. *See Porter v. Ollison*,
620 F.3d 952, 954–55 (9th Cir. 2010) (federal courts may take judicial notice of
state court dockets found on the internet).

1 Supreme Court affirmed his conviction. Accordingly, the one-year limitations
2 period was set to expire on September 14, 2016. *See Patterson*, 251 F.3d at
3 1245-47. Because petitioner did not initiate the current proceedings until August
4 8, 2017, the present action is untimely, absent statutory or equitable tolling. *See*
5 28 U.S.C. § 2244(d)(1).
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7 **2. STATUTORY TOLLING**

8 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a
9 properly filed application for state post-conviction or other collateral review with
10 respect to the pertinent judgment or claim is pending shall not be counted toward
11 any period of limitation under this subsection.” Here, petitioner admits he has
12 never filed a state habeas petition. Accordingly, he is not entitled to any
13 statutory tolling and the petition is untimely unless he is entitled to almost one
14 year of equitable tolling.
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16 **3. EQUITABLE TOLLING**

17 The AEDPA limitations period also may be subject to equitable tolling, if
18 the petitioner shows that extraordinary circumstances beyond the petitioner’s
19 control made timely filing of a federal habeas petition impossible and the
20 petitioner has acted diligently in pursuing his rights. *Holland v. Florida*, 560
21 U.S. 631, 649 (2010). The petitioner bears the burden of showing that equitable
22 tolling is appropriate. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).
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24 Petitioner argues³ that he is entitled to equitable tolling because: (1) his
25 counsel failed to timely send petitioner his “papers” and (2) when counsel did
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27 ³ Petitioner’s contentions regarding equitable tolling are set forth in a
28 document, filed concurrently with the petition, entitled “Motion to Show Cause As
to Time Filed Writ of Habeas Corpus.” (Dkt. 2.)

1 send him the papers, he sent them as standard prison mail rather than prison legal
2 mail.

3 A lawyer's failure to send a petitioner their legal materials can constitute
4 extraordinary circumstances that warrant equitable tolling. *See Espinoza-*
5 *Matthews v. California*, 432 F.3d 1021, 1027-28 (9th Cir. 2005). However, even
6 if a petitioner's counsel did not timely send the petitioner any materials, the
7 petitioner is not relieved of his obligation to show a causal relationship between
8 counsel's failure and the untimely filing of the petition. *See Spitsyn v. Moore*,
9 345 F.3d 796, 799 (9th Cir. 2003).

10 At this point, petitioner has not demonstrated that his attorney's failure to
11 timely mail petitioner's "papers" prevented him from filing a timely petition.
12 First, and perhaps most critically, petitioner has not explained why he needed the
13 materials in his attorney's possession in order to file the petition. Indeed,
14 petitioner does not define the term "papers" (i.e. whether they are trial
15 transcripts, prior filings, etc.), leaving the Court to guess about the materials'
16 usefulness or necessity. Additionally, petitioner admits that his lawyer did mail
17 him his documents, but that the mailing was untimely. However, petitioner does
18 not state when received the materials from his attorney. Moreover, although
19 petitioner purports to have attached a copy of the envelope in which his attorney
20 sent the "papers," no such copy is attached to the petition. Without knowing
21 when petitioner received the materials from his attorney, the Court cannot
22 evaluate petitioner's claim that he received his "papers" too late to effectively
23 file a timely petition. For these reasons, the Court finds that petitioner has not
24 shown that he is entitled to equitable tolling at this time.

25 26 **4. ORDER TO SHOW CAUSE**

27 Under the allegations and facts of the petition, petitioner has not
28 demonstrated that he is entitled to a later start date of the limitations period.

1 Therefore, and because the petition does not demonstrate any basis for tolling the
2 statute, or for setting aside the one-year limitation, the Court orders petitioner to
3 show cause in writing within thirty (30) days of the date of this order why the
4 petition should not be dismissed as time-barred. If petitioner fails to provide a
5 timely response to this order, the Court will recommend that the petition be
6 dismissed, with prejudice, as time-barred.

7 IT IS SO ORDERED.

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9 DATE: October 4, 2017

10 /S/ FREDERICK F. MUMM
11 FREDERICK F. MUMM
12 United States Magistrate Judge
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